

No. 82-1972

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ALEXANDER L. STEVAS.

In the Supreme Court of the United States

October Term, 1982

MARK HOCHANADEL,
Petitioner.

vs.

DETCO TRAILER, INC., and
LAWRENCE CORNELL.

**PETITIONER'S REPLY BRIEF TO PETITION FOR
A WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF THE STATE OF KANSAS**

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QUESTIONS PRESENTED

1. Whether there is a protectible property interest in a jury verdict sufficient to raise a federal question under 28 U.S.C. § 1257(3).

2. Whether this Court has jurisdiction under 28 U.S.C. § 1257(3) to consider an asserted federal question not explicitly the subject of a final judgment by the Supreme Court of Kansas.

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William H. Pickett, on behalf of Mark Hochanadel,
submits Petitioner's Reply Brief to the Petition for a
Writ of Certiorari to the Court of Appeals of the State
of Kansas.

REASONS FOR GRANTING THE PETITION

I. Petitioner Was Denied Property Without Due Process of Law, Because State Law Did Vest Petitioner With a Protectible Property Interest in the Jury Verdict.

Petitioner acknowledges that under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), what is "property" for the purposes of the Fourteenth Amendment Due Process Clause can be a matter of state law. However, "[t]he Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 572-73, 2706 (footnote omitted).

Respondents cite *Board of Greenwood County Commissioners v. Nadel*, 228 Kan. 469, 618 P.2d 778 (1980), in support of their proposition that petitioner had no property right in the jury verdict at issue sufficient to warrant Fourteenth Amendment protection. Such reliance on that case is unfounded. That case dealt only with the retroactive application of a statute as disturbing a tax board determination, and involved "vested property rights." *Board of Regents* does not require that property rights be "vested" before coming under Fourteenth Amendment due process protection; it instead refers only to a security of interests acquired in specific benefits as "property." *Id.* at 577, 2708.

Nevertheless, petitioner in the present case had more than a mere expectation that the jury verdict would remain undisturbed. Petitioner had a legitimate expectation that the jury verdict would not be disturbed and new trial granted other than on the exclusive grounds

stated in Kan. Stat. Ann. 60-259(a). Further, petitioner had a legitimate expectation that any new trial granted on such grounds would be supported with specific reasons. *Mettee v. Urban Renewal Agency*, 219 Kan. 165, 557 P.2d 356 (1976); *Herbel v. Endres*, 202 Kan. 733, 451 P.2d 184 (1969); and *Landscape Development Company v. Kansas City Power & Light Company*, 197 Kan. 126, 451 P.2d 398 (1966).

Petitioner had a legitimate claim of entitlement to the verdict, which could be disturbed only by the court acting within its jurisdiction. Yet, as already described in the Petition, that entitlement was indeed disturbed by the court acting without its jurisdiction. Such lack of jurisdiction results from the evidence that the trial court actually granted respondents a new trial because it was dissatisfied with the verdict, and not because of any of the exclusive statutory grounds, and from the fact that it failed to support its purported reasons with specificity.

Contrary to respondents' assertion, petitioner did have more than a unilateral expectation that the jury verdict would not be subjected to remittitur or reversal on appeal. Petitioner had a lawful expectation that the jury verdict would not be subjected to a remittitur or reversed on appeal, other than by a court acting within its jurisdiction. Respondents state in their Brief that the only reliance interest that is created when a person files a lawsuit is that it will be fairly decided at a hearing. Petitioner respectfully submits that such reliance interest in the present case has been arbitrarily undermined by the Kansas courts' failure to fairly decide petitioner's suit. Lack of fairness is evident from lack of jurisdiction.

Petitioner does not deny that in this case his claims were adjudicated fully at both the trial and appellate levels. What petitioner does assert, however, is that such claims were not adjudicated *fairly* at both the trial and appellate levels. Lack of fairness is evidenced by the fact that trial court's Order of Remittitur, or in the Alternative, a New Trial contradicted its findings, the evidence, and Kansas law. As a result the trial court was clearly without jurisdiction to order petitioner to accept a remittitur or in the alternative a new trial. Such order was entered simply because the trial court was dissatisfied with the verdict, and such order is arbitrary, unreasonable and capricious.

Therefore, petitioner asserts that there is a protectible property interest in the jury verdict sufficient to raise a federal question under 28 U.S.C. § 1257(3). Essentially the property interest arises from petitioner's right not to have such jury verdict disturbed except by a court acting in accord with Kansas law. The recognition of such property interest under Kansas law is apparent from the existence of the Kansas statute cited above which limits the grant of a new trial to specified grounds, and from the Kansas Supreme Court decisions cited above which have reversed the grant of a new trial where the new trial was granted for reasons not within the exclusive grounds provided by the new trial statute.

II. This Court Has Jurisdiction Under 28 U.S.C. § 1257(3) to Consider the Federal Question.

The decision of the Court of Appeals of Kansas in this case is a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. Such a decision was plainly final on the federal issue of whether the trial court de-

prived petitioner of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, by ordering a remittitur or in the alternative a new trial while lacking jurisdiction to do so.

It is evident that nothing further remains to be determined by the Kansas courts on this issue of the trial court's jurisdiction to order a remittitur or in the alternative grant a new trial. Nevertheless, should this Court find that a final judgment has not been rendered in this case, the decision on the federal question should be treated as a final judgment for the purposes of 28 U.S.C. § 1257. Any additional proceedings in the Kansas courts will not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review is the best way to avoid the mischief of economic waste and of delayed justice. *Cox Broadcasting Corp. v. Kohn*, 420 U.S. 469, 477-478 (1974). In this case the federal issue will not be mooted or otherwise affected by any proceedings yet to be had because they are wholly unrelated to the federal question.

Respondents further contend that in order for there to be a state adjudication on the federal issue, the state courts necessarily must have considered that issue. Petitioner has already asserted that the federal issue was raised first before the trial court, and that both the Court of Appeals of Kansas and the Supreme Court of Kansas implicitly ruled upon such issue by dismissal of plaintiff's appeal and *denial of review of that dismissal*. Regardless, even if this Court holds that petitioner failed to adequately raise his federal constitutional challenge in the Kansas courts, this Court has jurisdiction to review plain error unchallenged in the state courts to prevent fundamental

unfairness as exists here. See *Webb v. Webb*, 101 S.Ct. 1889, 1895 (1981), and *Wood v. Georgia*, 101 S.Ct. 1097, 1100 n.5, 67 L.Ed.2d 220 (1981).

Petitioner further disputes respondents' contention that petitioner in his Petition for Writ of Mandamus raised for the first time the issue before this Court—that the trial court deprived the petitioner of property without due process by ordering a remittitur or new trial. Such is not the case; that issue was raised before the trial court.

Therefore, for the above and foregoing reasons, this Court should exercise jurisdiction, under 28 U.S.C. § 1257 (3), over the final judgment of the Court of Appeals of Kansas regarding petitioner's due process rights in the jury verdict and judgment thereon.

CONCLUSION

Petitioner has adequately asserted a property interest cognizable as a property right protected by the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction under 28 U.S.C. § 1257(3) to consider the federal question asserted by petitioner herein.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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